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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY  
DOCKETING & SERVICE  
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In the Matter of )  
 )  
ONCOLOGY SERVICES CORPORATION ) Docket No. 030-31765-EA  
 )  
(Byproduct Material ) EA No. 93-006  
License No. 37-28540-01 )

NRC STAFF'S RESPONSE TO OSC'S MOTION  
TO COMPEL ANSWERS TO REQUESTS FOR ADMISSIONS

INTRODUCTION

Pursuant to 10 C.F.R. § 2.730(h) of the Commission's regulations, the Staff of the Nuclear Regulatory Commission (Staff) hereby responds to "OSC's Motion to Compel Answers to Request for Admissions" (Motion) filed by Oncology Services Corporation (Licensee). For the reasons set forth below, the Licensee's Motion should be denied.

BACKGROUND

On March 1, 1994, the Licensee filed "OSC's Second Set of Interrogatories, Request for Production of Documents and Requests for Admissions" (Licensee's Second Discovery Request). On March 21, 1994, pursuant to an agreement between the parties, the Staff responded to the Licensee's second set of requests for admissions, contained in the Licensee's Second Discovery Requests. "NRC Staff Responses and Objections to Licensee's Second Request for Admissions and NRC Staff Motion for Protective Order"

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(Staff's Response).<sup>1</sup> On March 27, 1994, the Licensee filed its Motion requesting the Board order that certain of the Staff's responses to its second set of requests for admissions be deemed as unqualified admissions.<sup>2</sup> For the reasons set forth below, the Licensee's Motion should be denied.<sup>3</sup>

### DISCUSSION

The Staff's specific responses to the Licensee's Motion are set forth below.

#### LICENSEE'S REQUEST FOR ADMISSION 2

Failure of the wall mounted survey meter did not occur on November 16, 1992 at IRCC.

#### STAFF'S RESPONSE

The Staff can neither admit nor deny this request. The IRCC technologists interviewed by the Incident Investigation Team (IIT) stated that the wall mounted PrimeAlert alarmed during the November 16, 1992 incident. The IIT determined that the source was exposed at the time the PrimeAlert alarmed. Subsequently, during the IIT

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<sup>1</sup> On March 31, 1994, pursuant to an agreement between the parties, the Staff responded to the Licensee's second set of interrogatories and requests for the production of documents contained in the Licensee's Second Discovery Request. "NRC Staff's Responses and Objections to Licensee's Second Set of Interrogatories and Request for Production of Documents and NRC Staff Motion for Protective Order."

<sup>2</sup> The Staff's Response contained a motion for a protective order, requesting that the Staff need not answer the Licensee's request for admission number 18. In its Motion, the Licensee did not request that the Board compel the Staff to respond to request for admission number 18 and did not specifically respond to the Staff's motion for a protective order.

<sup>3</sup> In its Motion, the Licensee provides that it reserves "its right to move to compel further responses to any and all remaining Staff responses to OSC's Requests for Admissions dated March 1, 1994." Motion at 1 n.1. Despite the Licensee's assertion, unless provided otherwise by the Board, the Licensee has no further right to move to compel responses to its requests for admissions since any further motion would be untimely. 10 C.F.R. § 2.740(f). *See also* "Memorandum and Order (Vacating OSC Protective Order; Denying Staff Motion for Protective Order)," April 5, 1994 at 2.

investigation, Dr. Bauer, in the presence of Dr. Paperiello, was able to cause the PrimeAlert to alarm using Dr. Bauer's Sr-90 eye applicator. The alarm ceased when the source was removed. However, Rudy Balko stated that he manipulated the power supply during, and perhaps subsequent to, the event on November 16, 1992. Therefore, Mr. Balko may have made the alarm inoperable for a certain period of time during the event.

#### LICENSEE'S ARGUMENT

OSC requests that the Board order that the Staff's response be deemed an admission. The Staff does admit that the PrimeAlert alarmed during the November 16, 1992 incident, that the source was exposed at the time of alarm, and that the alarm ceased when a radioactive source was removed. The Staff does not even address the word "failure." The Staff's admissions therefore constitutes [sic] an unqualified admission that the wall mounted survey meter did not fail on November 16, 1992 at IRCC.

#### STAFF'S RESPONSE TO ARGUMENT

The Licensee's request that the Staff's response to request for admission 2 be deemed an unqualified admission should be denied. The Licensee's request for admission requested an unqualified admission that failure of the "wall mounted survey meter" (PrimeAlert) did not occur on November 16, 1992. The Staff was unable to state, with certainty, whether the PrimeAlert failed on November 16, 1992, since no member of the Staff was present during the November 16, 1992 incident. The Staff provided, as requested by the Licensee,<sup>4</sup> an explanation as to why the Staff could not respond to this request with an unqualified admission. The Licensee also appears to suggest that by not addressing the word "failure," the Staff's response is inadequate. Presumably, the Licensee is aware of the definition of the word "failure," and, in fact, the Staff provided the Licensee with a definition of this common word in the Staff's response to the

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<sup>4</sup> The Licensee, in its Second Discovery Requests, specifically requested that if the Staff's response was anything other than an unqualified admission, the Staff provide a detailed explanation for its response. Licensee's Second Discovery Requests at 3.

Licensee's previous discovery requests. The Staff saw no further need to address this term. For the reasons stated above, the Staff's response to request for admission 2 is appropriate and the Board should deny the Licensee's request that the Staff's response be deemed as an unqualified admission.

#### LICENSEE'S REQUEST FOR ADMISSION 3

Rudy Balko had used a hand held survey meter at IRCC prior to November 16, 1992.

#### STAFF'S RESPONSE

Admit in part. Mr. Balko had held and turned on a hand held survey meter at IRCC prior to November 16, 1992. However, Mr. Balko was not trained in its use at the IRCC prior to November 16, 1992. He told the IIT that he had a little bit of survey meter experience in therapy school and that he was uncomfortable in its use. He was not clear on the sensitivity of the various scales.

#### LICENSEE'S ARGUMENT

OSC requests that the Board order that the Staff's response be deemed an unqualified admission. The Staff does admit that Balko "held and turned on" a survey meter at IRCC prior to November 16, 1992. The request for admission has nothing to do with whether Balko was trained in its use or what his experience in therapy school included. The request deals only with "use" and the Staff admits he had used it. Therefore, the response should be deemed an unqualified admission.

#### STAFF'S RESPONSE TO ARGUMENT

The Licensee's request that the Board order that the Staff's response to request for admission 3 be deemed an unqualified admission should be denied. The Staff admitted to this request, in part, in that Mr. Balko had held and turned on a hand held survey meter. The Staff could not provide an unqualified admission to this request, because as stated in the Staff's response, it was not clear that Mr. Balko knew how to use a hand held survey meter correctly or that he was comfortable with that use. The Staff's

reference to Mr. Balko's training in therapy school, as well as to the fact that he told the IIT he was uncomfortable with the use of a hand held survey meter was provided to explain, in detail, why the Staff could not respond to this request with an unqualified admission. The Licensee's request that the Staff's response to request for admission 3 be deemed an unqualified admission should, therefore, be denied.

#### LICENSEE'S REQUEST FOR ADMISSION 4

Sharon Rickett had used a hand held survey meter at IRCC prior to November 16, 1992.

#### STAFF'S RESPONSE

The Staff can neither admit nor deny this request. The IIT does not know if Sharon Rickett had ever used a hand held survey meter at the IRCC prior to November 16, 1992. She told the IIT that no one showed her how to use the survey meter or what the readings meant.

#### LICENSEE'S ARGUMENT

OSC requests that the Board order that the Staff's response be deemed an admission. The attempt by the Staff to limit the response to IIT is improper when the Staff is well aware that Rickett was deposed by OI and informed OI that she had used a hand held survey meter at IRCC prior to November 16, 1992. Therefore, this attempt to provide an evasive non-responsive answer constitutes bad faith by the Staff. Further, the request does not deal with the issue of what Rickett was shown during her schooling. The Staff's response should be deemed an unqualified admission.

#### STAFF'S RESPONSE TO ARGUMENT

The Licensee's request that the Board order that the Staff's response to request for admission 4 be deemed an admission should be denied. The Staff could neither admit nor deny the fact that Ms. Rickett had used a hand held survey meter at the IRCC, since the Staff was not present when Ms. Rickett allegedly had used a survey meter at the IRCC previously. The Staff, in an attempt to explain why it could neither admit nor deny the



Licensee's request for admission, explained that Ms. Rickett told the IIT that no one showed her how to use the survey meter or what the readings meant. The Licensee, in its Motion, misrepresents the Staff's response. The Licensee quotes the Staff's response as stating "She [Ms. Rickett] told the IIT that no one in school showed her how to use the survey meter or what the readings meant." Motion at 3. The Staff's response, which is quoted correctly above, did not limit Ms. Rickett's remarks to that she was not shown in school how to use a survey meter, but that no one had showed her how to use a survey meter or what the readings meant. In light of the Licensee's misrepresentation of the Staff's response, the Licensee's argument that the request did not deal with the issue of what Ms. Rickett was shown during her schooling is unfounded and fails to support its motion.

The Staff, in its response, inadvertently did not refer to the interview of Ms. Rickett by the NRC's Office of Investigations (OI), conducted on August 18, 1993, after the Order Suspending License was issued. However, the Licensee's assertion that Ms. Rickett informed OI that she had used a survey meter at the IRCC prior to November 16, 1992 is inaccurate. A review of Ms. Rickett's interview with OI on August 18, 1993 only indicates that Ms. Rickett informed OI that she had used survey meters in the past. She did not specifically state that she had used them at the IRCC. Thus, even considering Ms. Rickett's interview with OI, the Staff could not have responded to request for admission number 4 with an unqualified admission. The Licensee's request that the Staff's response be deemed an unqualified admission should, therefore, be denied.

LICENSEE'S REQUEST FOR ADMISSION 5

Greg Hay instructed Rudy Balko in the use of a hand held survey meter prior to November 16, 1992.

STAFF'S RESPONSE

Deny. Mr. Hay told the IIT that he had shown Mr. Balko how to use a survey meter, but that he did not train Rudy Balko in the use of the survey meter since he (Greg Hay) was not responsible for training.

LICENSEE'S ARGUMENT

OSC requests that the Board order that the Staff's response be deemed an admission. The Staff does admit that Hay showed Balko how to use a survey meter. Clearly, the Staff cannot in good faith claim that instructing Balko in "usage" is different than showing Balko how to use the survey meter. Indeed, the Staff's own language in response to request for admission 4 above clearly demonstrates that the Staff equates the term "shown how to use" with the word "training." Further, the Staff completely ignores the fact that Balko informed OI that Hay did tell him how to use a hand held survey meter. Such an improper and intentionally misleading response by the Staff constitutes bad faith. Request for Admission 5 should be deemed as an unqualified admission.

STAFF'S RESPONSE TO ARGUMENT

The Licensee's request that the Staff's response to request for admission 5 be deemed an unqualified admission should be denied. The Licensee's request for admission specifically states that Greg Hay "instructed" Rudy Balko in the use of a hand held survey meter. As provided in the Staff's response, Greg Hay told the IIT that he had shown Mr. Balko how to use a survey meter, but that he did not train Mr. Balko in its use. Based on that statement, the Staff denied request for admission 5 because Mr. Hay specifically denied to the IIT that he had trained Mr. Balko. The Staff equated the word "instructed" with the word "trained." The Licensee asserts that somehow the Staff's language in response to request for admission 4, quoted above, indicates that the Staff

equates the term "shown how to use" with the word "training." The Staff fails to understand the Licensee's assertion, since neither request for admission 4 uses the word "training" nor the Staff's response uses the word "training."

In addition, as noted in its response, the Staff based its answer on the information Greg Hay provided to the IIT in December 1992. The Staff, inadvertently, did not make references to the subsequent interviews of Greg Hay and Rudy Balko by OI in providing a response to the above request for admission. However, as discussed below, an examination of those interviews, as well as Mr. Balko's interview with the IIT, indicates that the Staff's response would not have been different. A review of the transcript of Mr. Balko's interview with the IIT indicates that when specifically asked by a member of the IIT whether any of the physicists trained him on a survey meter, Mr. Balko answered no. Transcript of Interview with Rudy Balko, December 4, 1992 at 33-34. Subsequently, in an interview with OI almost nine months later, Mr. Balko's interview transcript contains a description of an incident where Mr. Hay explained to Mr. Balko, over the telephone, how to check, with a survey meter, a radioactive source which had recently arrived at the IRCC. Transcript of Interview of Rudy Balko, August 18, 1993 at 24-25, 29, 32-34, 40-43. Mr. Hay's IIT interview transcript also contains a discussion of this incident, but at the same time Mr. Hay asserted that he did not train Mr. Balko in the use of a survey meter. Transcript of Interview with Greg Hay, December 4-5, 1992 at 35-36. In addition, a report of interview of a subsequent interview of Mr. Hay by OI, which was conducted almost ten months after the IIT interview of Mr. Hay, indicates that Mr. Hay had stated that he had trained Mr. Balko on the survey meter, but



it was not in Mr. Hay's contract to provide radiation safety training. Report of Interview with Greg Hay, September 27, 1993. Even considering this information, the Staff could not have provided an unqualified admission to this request for admission because of the conflicting nature of the information. The Board should deny the Licensee's request.

#### LICENSEE'S REQUEST FOR ADMISSION 13

10 CFR 35.21(a) does not require a level of frequency with respect to the RSO being physically present at a facility listed as a place of use.

#### STAFF'S RESPONSE

Deny, in part. Although no frequency is specifically prescribed in the regulation with respect to physical presence of the RSO, the regulation requires the RSO to ensure "that radiation safety activities are being performed in accordance with approved procedures and regulatory requirements in the daily operation of the licensee's byproduct material program." Section 35.21(b) lists the various responsibilities of the radiation safety officer. Read together, section 35.21 requires that the radiation safety officer obtain, on a continued basis, knowledge of the compliance status of the daily operation of the licensee's byproduct material program that is sufficient to ensure that the requirements of the license and the regulations are met.

#### LICENSEE'S ARGUMENT

OSC requests that the Board order that the Staff's response be deemed an unqualified admission. The Staff specifically admits that "no frequency is specifically prescribed in the regulation." Further, the request is very specific. The attempt by the Staff to read various sections "together" constitutes extreme bad faith and is an attempt not to answer proper discovery. The Staff's admission is a full admission.

#### STAFF'S RESPONSE TO ARGUMENT

The Licensee's request that the Staff's response to request for admission number 13 be deemed an unqualified admission should be denied. The Staff could not provide an unqualified admission to this request because, as explained in its response, section 35.21 requires that the RSO obtain knowledge of the compliance status of the daily

operation of the licensee's byproduct material program sufficient to ensure that the requirements of the license and the regulations are met. The Licensee asserts that the Staff inappropriately, and in bad faith, read two "various sections" of the regulations together. The "various sections" of the regulations that the Staff read together are two subparts of the same section, section 35.21(a) and 35.21(b). The Licensee's insistence that two subparts of the same section of a regulation must be read separately is misguided and indicates an inability on the Licensee's part to appropriately read and understand the Commission's regulations. Section 35.21(a) requires that the Licensee appoint an RSO who is, in turn, required to ensure that radiation safety activities are being performed. Section 35.21(b) outlines the responsibilities of the RSO. The Staff's response to the above request for admission was appropriate, made in good faith, and should not be considered a "full" admission. The Licensee's request should be denied.

#### LICENSEE'S REQUEST FOR ADMISSION 14

10 CFR 35.21(b) does not require a level of frequency with respect to the RSO being physically present at a facility listed as a place of use.

#### STAFF'S RESPONSE

See the Staff's response to request for admission 13.

#### LICENSEE'S ARGUMENT

See OSC's argument to Request for Admission 13.

#### STAFF'S RESPONSE TO ARGUMENT

See the Staff's response to Licensee's argument regarding request for admission 13.

LICENSEE'S REQUEST FOR ADMISSION 15

Regulatory Guide 10.8, Revision 2, appendix G does not specify either the manner or frequency of contact between the RSO and the users and workers.

STAFF'S RESPONSE

Deny in part. Although the manner of contact between the RSO and the users and workers is not specified in Regulatory Guide 10.8, Revision 2, Appendix G, section 3.c.(1) states that "[t]he RSO will be in close contact with all users and workers. . . ." In order to comply with the Licensee's commitment, in its license, to follow Regulatory Guide 10.8, Revision 2, Appendix G, it would be necessary for the radiation safety officer to have frequent contact with the locations of use listed on the license.

LICENSEE'S ARGUMENT

OSC requests that the Board order that the Staff's response be deemed an unqualified admission. The Staff specifically admits that regulatory guide 10.8, revision 2, appendix G does not address the manner or frequency of contact between the RSO and the users and workers. This attempt by the Staff to provide "lots of words" in response to this very specific request demonstrates extreme bad faith. Request 15 should be deemed an unqualified admission.

STAFF'S RESPONSE TO ARGUMENT

The Licensee's request that the Staff's response to request for admission 15 be deemed an unqualified admission should be denied. The Licensee, in its argument, misrepresents the Staff's response. The Staff did not admit that regulatory guide 10.8, revision 2, appendix G did not address the frequency of contact. The Staff stated that it would be necessary for the radiation safety office to have frequent contact with the locations of use listed on the license. The Staff, as discussed in its response, could not provide an unqualified admission to the Licensee's request for admission number 15. The Staff provided "lots of words" in response to the Licensee's request because it was necessary to explain, in detail, why the Staff's response was not an unqualified

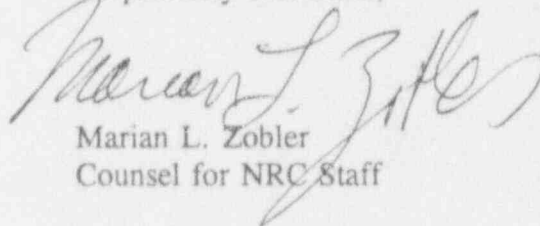
admission. The Staff's response, although it may have contained too many words for the Licensee's liking, was an accurate representation of the Staff's position, and was not provided in bad faith. The Licensee's request that the Staff's response to this request for admission be deemed as an unqualified admission should be denied.

In summary, none of the Licensee's arguments in response to the Staff's responses to the Licensee's request for admissions indicate that any of the Staff's responses should be deemed an unqualified admission. The Licensee's Motion should, therefore, be denied.

CONCLUSION

For the reasons set forth above, the Licensee's Motion should be denied.

Respectfully submitted,



Marian L. Zabler  
Counsel for NRC Staff

Dated at Rockville, Maryland  
this 11th day of April, 1994

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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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ONCOLOGY SERVICES CORPORATION ) Docket No. 030-31765-EA  
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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO OSC'S MOTION TO COMPEL ANSWERS TO REQUESTS FOR ADMISSIONS" in the above-captioned proceeding have been served on the following through deposit in the Nuclear Regulatory Commission's internal mail system, or by facsimile transmission, as indicated by an asterisk, or by electronic mail with a conforming copy served by deposit in the Nuclear Regulatory Commission's internal mail system, as indicated by a double asterisk, this 11th day of April, 1994:

G. Paul Bollwerk, III, Chairman\*\*  
Administrative Judge  
Atomic Safety and Licensing Board  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

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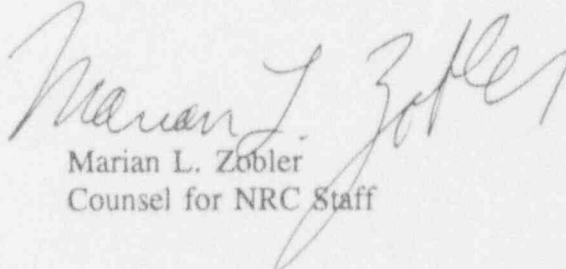
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